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NO. 84-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

A. L. ADAMS CONSTRUCTION CO.,

Petitioner,

v.

GEORGIA POWER COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Petitioner A. L. Adams Construction Company (hereinafter "Adams Construction" or "Petitioner") has presented the Court with an unduly argumentative statement of the Questions Presented. Respondent Georgia Power Company (hereinafter "Georgia Power" or the "Company") presents the following counterstatement of the issues Petitioner seeks to have the Court grant a Writ of Certiorari to resolve:

(1) Where an electric utility company and labor organizations representing construction craft workers have entered into an agreement

governing the terms and conditions of employment for craft workers employed on a single construction site at which the electric utility is performing the functions of a general contractor, is a provision in that agreement to the effect that the electric utility will only hire union contractors for work at that site exempt from the antitrust laws pursuant to the construction industry proviso of Section 8(e) of the National Labor Relations Act?

(2) Can an electric utility company enter into a prehire agreement under Section 8(f) of the National Labor Relation Act with labor organizations covering construction craft workers who will be employed by the utility and its subcontractors on a

construction project on which the utility will be performing the functions of a general contractor?

PARTIES TO THIS PROCEEDING AND CORPORATE AFFILIATIONS

The parties are set forth in the caption to this proceeding. Respondent Georgia Power is a subsidiary of The Southern Company. Georgia Power has two subsidiaries, Southern Electric Generating Company and Piedmont-Forrest Corporation, and is affiliated with the following companies: Alabama Power Company; Gulf Power Company; Mississippi Power Company; Southern Company Services, Inc.; and Southern Electric International, Inc.

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OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS

Georgia Power adopts Petitioner's statement of the Opinions Below, Jurisdiction, and Statutory Provisions.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is inaccurate and incomplete. Georgia Power offers the following in lieu thereof.

I. Proceedings and Disposition Below

Georgia Power refused to hire Adams Construction to build an administrative building at a nuclear generating plant construction project owned and managed by Georgia Power. Adams Construction asserted that the Company violated section one of the Sherman Act, 15 U.S.C. § 1, by entering into an agreement with

local construction unions to exclude nonunion contractors, including Adams Construction, from work at Georgia Power's construction site. The Company moved for summary judgment based on (1) the labor exemption to the anti-trust laws as articulated by Connell Construction Company v. Plumber and Steamfitters Local Union No. 100, 421 U.S. 616 (1975); (2) the absence of any agreement to hire only "union contractors" and the Company's right to decide unilaterally with whom it deals as enunciated by United States v. Colgate & Co., 250 U.S. 300 (1919); and (3) the theory that the Company was entitled to judgment as a matter of law under the rule of reason as articulated in Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). Assuming the

existence of an agreement to hire only union contractors as alleged by Adams Construction, the United States District Court for the Southern District of Georgia granted the Company's motion, holding that any such agreement was exempt from the antitrust laws pursuant to the implied exemption to accommodate the nation's labor laws. The district court did not reach the alternate grounds urged by the Company. The United States Court of Appeals for the Eleventh Circuit affirmed. Noting the comprehensive opinion of the district court, the court of appeals opinion focused on the particular arguments advanced by Adams Construction to overturn that decision, arguments which are repeated in the petition sub judice. Although the Company again urged that

it was also entitled to judgment as a matter of law on additional grounds, the court of appeals did not reach those grounds. The court of appeals denied Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc.

II. Statement of Facts. Adams Construction is a general building contractor located in Augusta, Georgia which unsuccessfully sought the contract from Georgia Power to construct the 3.5 million dollar Administration Building in the center of the 7.2 billion dollar Alvin W. Vogtle Nuclear Generating Plant construction project (hereinafter "Plant Vogtle") in Burke County, Georgia, approximately forty miles from Augusta, Georgia. Georgia Power owns approximately fifty percent

of Plant Vogtle as a tenant in common with other utilities and is their exclusive agent for constructing the plant. The Company is the project construction manager and periodically bills its co-owners for their proportionate shares of construction costs. (R-1173)

Having subcontracted all major phases of the work to other contractors, the Company performs the functions normally fulfilled by a general contractor. At the time this action began, Georgia Power had over nine hundred employees at Plant Vogtle. They (1) administered the various construction contracts; (2) scheduled, supervised, and inspected the construction work; (3) implemented and enforced safety programs; (4) maintained quality

control standards; and (5) provided security for the site. (Johnston[1] at 365-78; Mitchell at 507-12, 537, 557-59) The Company provides all equipment, materials, and hand tools used by the major contractors at Plant Vogtle and operates the warehouse. The Company's on-site labor relations coordinator monitors the interactions of the construction trade unions and the contractors with respect to grievances, work assignments, safety programs, and equal employment opportunity obligations. (Johnston at 370-71)

Georgia Power usually performs the functions of general contractor at its construction projects. Over the past

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[1] Citations to depositions are by the last name of the deponent and the appropriate pages.

twenty years the Company has constructed numerous power plants as its own general contractor. (Mitchell at 444-88).

During the early 1970's, when Plant Vogtle was in its early planning stages, the Company evaluated how best to construct the plant, considering the size and complexity of the job, the number of skilled workers required, and the location of the project. The Company determined that Plant Vogtle could be most efficiently constructed with the Company acting as its own general contractor relying on union craftsmen. (Ehrensperger at 106-108, 121-22; Mitchell at 517-18, 500-01; Johnston at 132). In the early 1970's no nonunion contractors with experience in the pipe

fitting, boilermaking, and millwright work were available to work as subcontractors to Georgia Power. (id.) The Company also wanted to insure that it would have available the large number of skilled craftsmen required to construct this nuclear power plant, which was located in a remote area. (Id.) The Company, however, had encountered some unnecessary costs and inefficient work practices at other projects constructed by union craftsmen. Accordingly, the Company negotiated the Project Agreement in early 1974 with the Augusta Building and Trades Council ("Trades Council") to avoid these costs and inefficiencies and to ensure an adequate supply of skilled labor. (Conway at 37-38, 50, 55-56, 70; Johnston at 97, 282; Mitchell at 112,

520-21, 578-81.) As its table of contents shows, the Project Agreement is a comprehensive collective bargaining agreement:

ARTICLE 1.	Intention of the Parties
ARTICLE 2.	Recognition
ARTICLE 3.	Scope of Agreement
ARTICLE 4.	Referral of Men
ARTICLE 5.	Management of Project
ARTICLE 6.	Hours of Work, Overtime, Shifts and Holidays
ARTICLE 7.	Wage Scales and Fringe Benefits
ARTICLE 8.	Payment of Wages - Checking In and Out
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ARTICLE 10.	Jurisdictional Assignments & Settlement of Jurisdictional Disputes
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ARTICLE 19.	Terms of Agreement

General Work Rules for Plant Alvin W. Vogtle Nuclear Plant

(R-1180.)

The Project Agreement gave the Company and its contractors improved control over the workforce; limited various costly union practices, including travel pay, subsistence pay, and show-up pay; and provided a ready source of skilled workers. (Mitchell at 520-21, 581-84) The Project Agreement benefited the Trades Council by providing work for union members by requiring that all Plant Vogtle craft workers be referred through local union hiring halls, although the Project Agreement specifically prohibits discrimination on the basis of union membership, and by establishing the terms and conditions of employment under which all craft workers would be employed. (Johnston at 55)

Experience taught the Company that labor disruptions are likely to occur on a construction project if union and nonunion contractors are present at the same time. (Ehrensperger at 40-41; Johnston at 230, 268-69, 289; Mitchell at 143-45, 317-18, 477-78, 571) The Company also doubted that a nonunion contractor could obtain appropriate referrals. (Ehrensperger at 44; Mitchell at 158) Therefore, having negotiated the Project Agreement with its requirement that all craft workers be referred by union hiring halls, the Company decided to use only union contractors at Plant Vogtle. (Ehrensperger at 39-41, 57-58, 60-64; Johnston at 56, 86-88, 268-69, 289-90; Mitchell at 143-45, 177-84, 317, 335, 628) Petitioner contends that the Company's

decision was in effect an agreement with the Trades Council only to hire union contractors to work at Plant Vogtle, a contention accepted by the courts below for purposes of ruling on Georgia Power's motion for summary judgment.

When it signed the Project Agreement in 1974, Georgia Power had a long established practice of directly employing large numbers of craft workers on power plant construction projects where it acted as its own general contractor. (Conway at 87; Ehrensperger at 116-18; Mitchell at 534-37, 575-76) At Plant Vogtle, the Company employed approximately one hundred and fifty (150) craftworkers referred to it pursuant to the Project Agreement during the early stages of

construction. (Johnston at 326, 330-31, 339-42, 363-64) The Company ceased this practice in 1978, four years after the Project Agreement was signed, due to changes in the pension laws, and its craft employees were transferred to the payrolls of the contractors working for Georgia Power at Plant Vogtle. (Mitchell at 534-35)

In March of 1980, Georgia Power invited six contractors to submit bids on the Administration Building contract, including Adams Construction. Georgia Power received bids from three of those contractors, including Petitioner, only one of which was a union contractor. The Company rejected these bids. (Mitchell at 300-01, 309-13) In July of 1980, the Company invited several union contractors to bid on the

Administration Building. After Adams Construction assured the Company that it would take steps that would allow it to work as a union contractor if it were low bidder, the Company permitted it to bid for the work. (Ehrensperger at 45, 81-82; Johnston at 222-23; Mitchell at 325-27, 563-64) Adams Construction submitted the lowest bid. Instead of attempting to establish a relationship with the unions referring workers to Plant Vogtle, Adams Construction indicated that it intended to subcontract all of the work to union subcontractors. Instead of having a significant number of craft workers and craft foremen on its own payroll, Adams would only have two or three administrative employees on the job. The Company decided not to hire Petitioner

and instead accepted the second lowest bid, one from a union contractor.

Adams Construction engages in non-specialized, non-nuclear commercial construction work. It has many competitors originating from Augusta, elsewhere in Georgia, and South Carolina. (R-311-16, 1033-36, 1044-45, 1048-50; Adams at 84, 112) Adams Construction has many product and geographic substitutes for work on the Administration Building, a non-nuclear facility similar to office buildings, schools, or small hospitals. (Mitchell at 533-34) The fact that Adams Construction has never worked for Georgia Power has not prevented it from competing in the market for construction services. (Adams at 41)

Adams Construction takes the opportunity of its petition for a writ of

certiorari to exhibit a strident anti-union animus and to defame Georgia Power's management of Plant Vogtle. The record shows that the Company sought to capture the benefits of competition for its customers in the form of concessions from local unions at a time when "non-union" contractors were less evident in the heavy construction industry than they are today. (Conway at 37-38, 50, 55-56, 70; Mitchell at 112, 520-21, 578-81) The Project Agreement, entered into before Connell Construction was decided and at a time when the Company directly hired construction workers, was the vehicle for capturing the benefits of competition. The Project Agreement has governed all terms and conditions of employment for all craft employees hired by Georgia

Power and by its contractors, including the several thousand craft workers on the project today who are working to complete Unit 1 in 1987 and Unit 2 in 1988. Plant Vogtle has been specially noted by the Office of Inspection and Enforcement of the Nuclear Regulatory Commission in its Report to Congress as an example of high quality nuclear power plant construction. Nuclear Regulatory Commission, Improving Quality and the Assurance of Quality in the Design and Construction of Nucler Power Plants (1984) at A.11. No basis exists in the record to infer that the Company's reliance on union contractors, or any other construction management decision by it, has adversely affected this project.

REASONS FOR DENYING THE WRIT

This case is not an appropriate case for granting a writ of certiorari because (I) Petitioner is merely seeking to reargue characterizations of undisputed facts, (II) the decisions below are correct and consistent with controlling and persuasive authority, and (III) alternate grounds support the judgment below.

I. Petitioner Is Merely Seeking To Reargue the Characterization of Undisputed Facts.

In its petition, Adams Construction attacks the ruling made by the Eleventh Circuit largely on the basis of arguments that factual characterizations made by the district and circuit courts are erroneous. It challenges these courts' characterization (1) of Georgia Power as acting as a general contractor

on the Vogtle project, (2) of the Project Agreement as a collective bargaining agreement, and (3) of Georgia Power as an employer of craft labor on the Vogtle Project. As in its arguments before the lower courts, Adams Construction relies primarily upon labels used by some witnesses in describing either Georgia Power's activities or the Project Agreement. Petitioner does not, however, cite the Court to any evidence in the record creating an issue of fact concerning Georgia Power's negotiation of the Project Agreement with the Trades Council; Georgia Power's hiring of numerous craftworkers on its own payroll; or Georgia Power's activities and functions in constructing Plant Vogtle, and in the construction of

other generating plants. Petitioner does not dispute that construction is the only activity undertaken at Plant Vogtle and that the Company is responsible for that construction.

While not disputing these facts, Adams Construction argues that "pouring concrete" and obtaining an unidentified "license" are what puts one in the construction business. Adams Construction cannot challenge the substance of the Company's activities at Plant Vogtle, only the form, in light of the facts. As the United States District Court for the Southern District of Georgia found in Luke v. Owsley:

> Plant Vogtle is a major undertaking by Georgia Power Company and several others, all owners of the plant, to construct a nuclear power facility south of Augusta, Georgia.

Although there is no prime contractor, Georgia Power, for itself and as agent for the other owners, oversees the entire project. Because of the immensity and complexity of the project along with the ever changing regulations governing nuclear power plant construction, the plant it not completely designed but is built bit-by-bit as it is designed.

To build the plant, Georgia Power contracted with six companies to handle the various aspects of the construction. For example, one company may handle the steel work involved while another is concerned only with any excavation or earth moving required during construction. Ingalls and Walsh Construction Company, Luke's employer, are two of these six companies under contract with Georgia Power.

Under the contracts Georgia Power enjoys almost despotic power. None of the companies are required to furnish anything other than labor and expertise in their assigned areas. All vehicles, tools, materials, safety equipment, sanitary and first aid services, office space and equipment are provided by Georgia Power. Worker's compensation insurance is provided by Georgia Power who also reimburses each company its payroll along with a fixed monthly fee. In addition to being the sole material

and financial supplier for the companies, the work schedules and time tables for completing work assignments are established and coordinated by Georgia Power. All employees are required to follow Georgia Power's work rules and security procedures and policies. Each company may hire only as many employees as are authorized by Georgia Power, and it may require the dismissal of any employee who fails to observe the established security policies of the project. Finally, Georgia Power may terminate any contract with any company for its or any owner's convenience.

. . . .

An analysis of the contractual relationship between Georgia Power and the six contractors demonstrates the presence of a master-servant relationship. Clearly, Georgia Power controls the time, manner and method of the construction at Plant Vogtle. The contracts leave very little, if any, authority to the contractors with the exception of immediate supervision. It appears undisputed that the contractors were hired to provide expertise, but beyond that, Georgia Power's authority is pervasive....

Luke v. Owsley and Sons, Inc., C.A. No. CV-181-129 (S.D. Ga. September 27,

1982) (Judge Bowen).[2] In light of these facts, certiorari should not be granted in order to review the legal conclusion that Georgia Power is primarily engaged in the construction industry at Plant Vogtle.

II. The Decision Rendered by the Court of Appeals Is Correct, Does Not Conflict With Any Decisions by This Court or Any Other Circuit Court Decisions, and Is in Harmony With Decisions by the National Labor Relations Board.

Adams Construction suggests that the decision by the Eleventh Circuit Court of Appeals conflicts with prior decisions of this Court and expands the scope of the nonstatutory exemption to the federal antitrust laws protecting

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[2] A copy of this opinion is attached to the Brief of Defendant-Appellee Georgia Power Company filed with the Eleventh Circuit Court of Appeals on June 15, 1983.

certain agreements between unions and employers.[3] Contrary to that suggestion, the decision below is a narrow ruling based upon the unique facts presented by this action. That decision comports with prior decisions of this Court, of other circuit courts, and of the National Labor Relations Board

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[3] Adams Construction's expressed alarm at the extension of the nonstatutory exemption to an electric utility is frivolous. In Mid-America Regional Bargaining Assoc. v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir.), cert. denied, 459 U.S. 860 (1982), the plaintiff alleged that Commonwealth Edison, an electric utility, and other defendants, including construction trade unions, had conspired to impose an artificially high wage scale that would injure other contractors. The Seventh Circuit upheld the lower court's ruling that the defendants, including Commonwealth Edison, were immune from antitrust liability under the nonstatutory exemption. Moreover, Georgia Power's status as a regulated public utility has no relevance to the issues raised by this action.

("NLRB"). Moreover the policies underlying Congress' enactment of the specific sections of the National Labor Relations Act ("NLRA") at issue in this action are furthered by the decision of the Eleventh Circuit.

A. The Eleventh Circuit's Determination That the Project Agreement Was a Valid Prehire Agreement Does Not Conflict With Any Other Decision and Is Consistent With the Purposes of Section 8(f) of the National Labor Relations Act and the National Labor Relations Board's Construction of That Provision.

In its attack upon the Eleventh Circuit's conclusion that the Project Agreement was a valid prehire agreement under § 8(f) of the NLRA, 29 U.S.C. § 158(f), Adams Construction notes that the Court below "did not support its reasoning with a single federal case." Adams Construction, however, does not

cite a single case that conflicts with the decision below. More importantly, that decision is amply supported by the decisions of the NLRB and by the purposes underlying the enactment of § 8(f). The decision below represents a reasoned elaboration of existing precedent that does not conflict with other determinations of the relationship between the nation's labor and antitrust laws.

(1) Applying Section 8(f) to the Project Agreement Promotes the Policies Underlying the Statute's Enactment.

The legislative history of § 8(f) demonstrates that Congress enacted it in part to alleviate problems faced by employees in the construction industry who wished to bargain collectively, which problems resulted from the

occasional nature of the employment relationship in that industry. S. Rep. No. 187, 86th Congress., 1st Sess. 27-28, reprinted in [1959] U.S. Code Cong. & Admin. News 2318, 2344. In an effort to accommodate that pattern of employment, unions and employers in the construction industry developed a practice of entering into bargaining agreements that were not limited to the employees on a single project but instead applied to all of the employer's projects over a period of time including jobs that had not been started and for which no employees had been hired. That practice also benefited the employer by allowing him to estimate better his labor costs and to insure a readily available supply of skilled craftsmen. Id. at 2344-45.

The employment by Georgia Power and its subcontractors of craft workers at Plant Vogtle raises the same concerns that prompted Congress to enact § 8(f). Although the duration of the entire project is relatively long, individual contractors are on the project much shorter periods of time. Also, the period during which any particular craft worker is employed by a contractor is not likely to be for the full duration of the contractor's time on the project since different types of craft employees may be needed for different phases of the work.[4] On a

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[4] For example, Georgia Power estimated that the contractor constructing the Administration Building would require approximately fourteen months to complete that facility. (Gregory at 113-14). During that period the contractor would use a variety of craft

(Footnote Continued on Next Page)

project as large as Plant Vogtle the importance to Georgia Power and to those contractors bidding on subcontracts with it of being able to know in advance their approximate labor costs is manifest. The testimony of those Georgia Power employees responsible for the construction of Plant Vogtle and for the negotiation of the Project Agreement emphasized the desire of Georgia Power to have an adequate supply of skilled labor to undertake a project the size of Plant Vogtle in a remote location.

(Footnote [4] From Previous Page)

workers. Ironworkers might be required only at the beginning of construction when the steel frame is erected, whereas roofers would be required only in the finishing stages.

Thus, the pattern of employment of craft workers at Plant Vogtle is identical to that in which Congress intended to allow the negotiation of prehire agreements. Only by negotiating the Project Agreement could Georgia Power ensure an adequate supply of skilled labor and fix its and its contractors' labor costs. Only by negotiating with Georgia Power could the Trades Council obtain an agreement that would establish uniform terms and conditions of employment applicable to all craftsmen employed at the Vogtle construction site.

(2) The Decision Below Is Consistent With the NLRB's Interpretation of § 8(f).

The ruling by the Eleventh Circuit is in accord with the construction of § 8(f) by the NLRB, which has held that

an employer may be engaged primarily in the construction industry at some work sites but not at others, depending on its activities at each site. See Hoover, Inc., 240 NLRB 593, 599 n. 17 (1979); Forest City Dillon-Tecon Pacific, 209 NLRB 867 (1974), enforced in part and remanded in pact, 522 F2d 1107 (9th Cir. 1975); Zidell Explorations Inc., 175 NLRB 887 (1969).

In Zidell Explorations, Inc., 175 NLRB 887 (1969), the NLRB reversed the trial examiner's determination that a corporation whose primary activity was shipbuilding could not enter into a §8(f) agreement with respect to persons it would employ in the dismantling of a missile site, stating:

> Although the Trial Examiner found Zidell's primary field of activity to be shipbuilding, thereby disqualifying it from the 8(f) exemption, the record is clear that Zidell's entirely separate operation at the missile site was consonant with the Congressional purposes and objectives of the 8(f) exemption.
>
> . . . [I]t is clear that Zidell has frequently engaged in transitory on-site operations in the construction industry similar to those performed at the missile sites and has employed the skilled craftsmen and operators normally associated with the building and construction industry required to accomplish its objectives. Its work on this job was in all characteristics identical to that performed in the construction industry despite the fact that some of Zidell's other projects not discussed here were of a type unrelated to the construction industry.

Id. at 888-89 (footnote omitted). The full Board restated this rule in 1978 when it said: "The exemption has also

been applied to employers whose general business is not in the industry, but who are engaged in construction on a specific project." Teamsters Local 83, 243 NLRB 328, 331 (1978).

The decisions cited by Adams Construction, Frick Co., 141 NLRB 1204 (1963), and Carpet, Linoleum and Soft Tile Local No. 1247, 156 NLRB 951 (1966), did not establish any "gross revenue" test as asserted by it. Instead, those cases distinguished a manufacturer or retailer of a product that only incidentally engages in the installation of its product at a construction site from an employer that performs construction activities at a site.

Georgia Power performs the function of a general contractor at Plant

Vogtle, exerting total control over the construction work. Nor can its activities at Plant Vogtle be characterized as an isolated excursion into the construction industry, since Georgia Power has acted as its own construction manager, performing the functions that would normally be performed by a large industrial general contractor, including hiring craft workers, in the construction of numerous generating plants since 1960. (Mitchell at 444-487.)

To interpret § 8(f) in the manner that Adams Construction suggests would prevent any large employer that was not a construction contractor but that chose to act as its own general contractor on a construction project from entering into a prehire agreement with construction trade unions for that

project. Simply because the Company is not a "construction contractor" as Petitioner would restrict that concept, Adams Construction would deny Georgia Power the opportunity to determine in advance its labor costs and to secure a readily available skilled workforce and would deny the craft workers the Company employed on this project the opportunity to avoid the hindrances to collective bargaining caused by the nature of employment on construction projects. Under Adams Construction's interpretation of § 8(f) such a result would be compelled even though the employer was primarily engaged in the construction industry on the construction project and was performing functions that did not differ in any material respect from those of any general contractor that it might have hired.

B. The Decision Below Follows This Court's Construction of the Nonstatutory Exemption and Section 8(e) of the National Labor Relations Act and Is Supported by the Applicable Legislative History.

This Court examined the scope of both § 8(e) of the NLRA and the nonstatutory exemption in the context of a restrictive subcontracting agreement in Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975). In Connell, Local 100, which represented workers in the plumbing and mechanical trades in Houston, forced Connell to agree to employ on projects within Local 100's jurisdiction only plumbing subcontractors that had a collective bargaining agreement with it. Local 100 was not, and expressly disclaimed any interest in being, the collective bargaining

representative of any employee of Connell. Id. at 619-20. In response to Connell's antitrust claim against it, Local 100 asserted that the restrictive subcontracting agreement was protected by the nonstatutory exemption and by its lawfulness under the construction industry proviso to § 8(e).

To determine whether the nonstatutory exemption applied, this Court balanced the effect of the agreement upon commercial competition against the labor interests that it promoted. The agreement, the Court noted, had several anti-competitive effects. It indiscriminately excluded nonunion subcontractors from the Houston area market, regardless of whether their competitive advantage resulted from more efficient

operating methods rather than substandard wages and working conditions. Id. at 623. Because the multiemployer bargaining agreement between Local 100 and the subcontractors employing its members had a "most favored nation" clause requiring the union to apply favorable contract terms negotiated with any employer to all the employers in the multiemployer group, the subcontracting agreement had the effect of sheltering members of the employer group from competition on all subjects covered by the multiemployer bargaining agreement. Id. at 623-24. Finally, because the subcontracting agreement applied to all jobs on which Connell was working and required that plumbing subcontractors have a bargaining agreement specifically with Local 100, the agreement

allowed Local 100 to dictate which subcontractors had access to work from Connell. Id. at 624-25.

The only labor policy that the subcontracting agreement promoted was Local 100's desire to organize as many subcontractors as possible. While that goal was legal, the agreement, the Court concluded, had a substantial anticompetitive effect that went far beyond any restraint that was necessary to effectuate it. Id. at 624-25. In holding that the subcontracting agreement was not protected by the nonstatutory exemption, the Court emphasized the lack of any collective bargaining relationship between Connell and Local 100. Id. at 625-26.

The Court then analyzed and also rejected Local 100's argument that the

agreement was expressly permitted by the construction industry proviso to § 8(e) and therefore was lawful. Examining the subcontracting agreement sought by Local 100 from Connell, the Court found that the agreement served none of the purposes of the proviso since Local 100 did not seek to represent any of Connell's employees, the agreement was not limited to sites where Local 100's members were working, and it applied only to work performed by Local 100's members and did not prevent the subcontracting of other work to nonunion workers. Id. at 631. The only purpose of the agreement with Connell was to pressure mechanical subcontractors to recognize Local 100 as the representative of their employees, which, the Court reasoned, was the type

of "top-down" organizing tactic that Congress had sought to prevent. Id. at 632-33.

In contrast to Connell, the agreement alleged by Adams Construction does not apply to any construction site but Plant Vogtle. Nor does it restrict Georgia Power to using only contractors having agreements with a certain union or group of unions. Adams Construction does not allege that either the Project Agreement or the unions' local area agreements contain a most-favored-nation clause, which would inhibit competition among contractors. The Supreme Court's concern in Connell that the subcontracting agreement might be used by Local 100 to create a closed market for local contractors, similar to that found to exist in Allen Bradley

Co. v. IBEW, Local 3, 325 U.S. 797 (1945), has no relevance to this case. The Vogtle project has attracted contractors from across the nation. (Mitchell at 524-29.)

While the union in Connell disclaimed any interest in representing any of Connell's employees and sought an agreement that concerned solely the subcontracting of one type of work, the Project Agreement represents collective bargaining by Georgia Power and the Trades Council concerning all terms and conditions of employment for craft workers employed at Plant Vogtle by Georgia Power and its contractors. Georgia Power has employed at Plant Vogtle more than 150 craft workers under the terms and conditions established by the Project Agreement, which

workers were referred to it by the unions comprising the Trades Council.

Additionally, restricting the project to union subcontractors promotes the policies underlying the construction industry proviso to § 8(e) of the National Labor Relations Act by preventing labor disputes at the job site resulting from the presence of nonunion and union contractors contemporaneously on the project. In a right-to-work state such as Georgia, labor disruption on a construction site does not result from union members and nonunion workers being present together on the same job site, but from picketing and other frictions caused by the presence of nonunion contractors, whose employees are not covered by a collective bargaining agreement, on the same

site with union contractors.
(R-1324-25)

The legislative history of § 8(e) demonstrates that Congress enacted that section to address this pattern of employment in the construction industry. The enactment of the construction industry proviso was motivated in part by a desire to overrule NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951). Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, _____, 102 S.Ct. 2071, 2080-81 (1982); Connell, 421 U.S. at 629. The legislative history of that section referred to the problems faced by employees in picketing a single non-union subcontractor on a project on which many employers were working and to the close community of interests

between contractors and subcontractors at the jobsite. In Woelke, the Court also noted a variety of other purposes served by the proviso, including an intention to preserve the then existing pattern of collective bargaining in the construction industry, including the use of broad restrictive subcontracting provisions. 456 U.S. at_____, 102 S.Ct. at 1079-80.

The restrictive subcontracting agreement alleged by Adams Construction serves all of the purposes of the construction industry proviso to § 8(e). Moreover, the undisputed facts in the record demonstrate that the agreement imposes no greater restraint than is necessary to carry out those purposes. Any agreement between Georgia Power and the Trades Council to use only union

contractors at Plant Vogtle was negotiated in the context of a collective bargaining relationship, was limited to a single site, did not require that the contractors have agreements with specific unions, and was consistent with the historical pattern of union-employer agreements in the construction industry.

While Adams Construction claims that its proposal to subcontract all of the work to be performed on the Administration Building to union subcontractors would have enabled it to comply with the Project Agreement and that its exclusion was for reasons unrelated to the protection of union wage rates and benefits, Adams Construction would have remained a nonunion contractor and its

craft employees on all its other projects would not be covered by collective bargaining agreements. Its low bid on this job may have been subsidized by the substandard wages and benefits paid to its craft workers on other jobs. Moreover, Adams Construction's president testified that it did not intend to engage in any negotiations with the construction trade unions had it been awarded the job, including the handling of grievances. (Adams at 101-102) Clearly, awarding the Administration Building contract to Adams Construction would have created a potential for disruption of the entire project.

C. The Facts of This Case Differ Significantly from Those Situations in Which the Federal Courts Have Imposed Antitrust Liability Upon Agreements Between Unions and Employers.

Antitrust liability has arisen in the context of collective bargaining only where the parties to the agreement agree with predatory intent to impose ruinous conditions on the trade competitors of the nonlabor party, or where an employer or a cartel of employers utilize a labor agreement to restrict entry or fix prices. See e.g., Ramsey v. UMW, 401 U.S. 302, 313 (1971); UMW v. Pennington, 381 U.S. 657 (1965); Allen Bradley Co. v. IBEW, Local 3, 325 U.S. 797 (1945); James R. Snyder Co. v. Associated General Contractors of America, 677 F.2d 1111, 1119-20 (6th Cir.), cert. denied, 459

U.S. 1015 (1982); Smitty Baker Coal Co. v. UMW, 620 F.2d 416, 431-33 (4th Cir.), cert. denied, 449 U.S. 870 (1980); Embry-Riddle Aeronautical University v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974). Adams Construction has failed to identify any evidence in the record establishing an anti-competitive objective on the part of Georgia Power. It has identified no nonlabor party to the alleged conspiracy other than the Company and its service company affiliate and agent, Southern Company Services, Inc., neither of which competes with nonunion contractors.

Adams Construction makes broad assertions that the Trades Council wished to eliminate competition from nonunion contractors and that the

Project Agreement "artificially" put union contractors in a better competitive position. Trade unions, however, do not compete with contractors. Associated General Contractors of California v. California Council of Carpenters, 459 U.S.519, ____, 103 S.Ct. 897, 909 (1983). Moreover, Adams Construction makes no factual challenge to the status of the Trades Council as a bona fide labor organization representing the interests of workers to be employed by Georgia Power and its contractors, unlike the organization composed of independent contractors found to exist in United States v. Olympia Provision & Baking Co., 282 F.Supp. 819 (S.D.N.Y. 1968), aff'd, 393 U.S. 480 (1969), cited by Adams Construction.

Finally, no construction contractors, the only entities with whom Adams Construction competes, were involved in the negotiation of the Project Agreement. Nor does the record contain any evidence or allegation of any contractors acting in concert with the unions signatory to the Project Agreement to exclude nonunion contractors from work at Plant Vogtle, which distinguishes this action from the Third Circuit's recent decision in Altemose Construction Co. v. Building & Construction Trades Council of Philadelphia, 751 F.2d 653 (3rd Cir. 1985).

The record reflects simply that Georgia Power did not wish to mix union and nonunion contractors on the same job site based upon its own prior experience with the disruptions that can

result from such a mixture. (R-1174; Ehrensperger at 39-41, 57-58, 60-64; Mitchell at 143-45, 177-84, 317, 477-78, 571, 628.) Therefore, the only time at which union and nonunion contractors would be "competing" for work at Plant Vogtle would be at the time of the initial decision by Georgia Power whether to use union contractors or nonunion contractors. The execution of the Project Agreement simply effectuated Georgia Power's choice to use union contractors and did not improve the subsequent competitive position of union contractors.

Thus, the element of predation required by those courts that have found union-employer agreements to be violative of the antitrust laws is

strikingly absent from the case sub judice. The record reflects no purpose on the part of Georgia Power to injure or eliminate any entity with which it competes or to aid any of Adams Construction's competitors, and it contains no evidence of any involvement of the entities with whom Adams Construction does compete, other construction contractors, in the conspiracy that it alleges.

III. Alternative Grounds Exist To Support the Lower Court's Ruling in Favor of Georgia Power Company Which Render This Case Inappropriate for Review on Certiorari.

In affirming the district court's grant of summary judgment on Adams Construction's antitrust claim, the Eleventh Circuit did not address several arguments raised by Georgia

Power in support of that judgment. Because these other grounds for affirmance exist, this case does not squarely present the issues for which Adams Construction seeks a writ of certiorari. First, even if Georgia Power could not lawfully enter into a § 8(f) prehire agreement, its relationship with the construction trades unions evolved into a full-fledged collective bargaining relationship when the Company hired workers represented by the Trades Council, and the Company accordingly became obligated to obey the Project Agreement. Even if the Project Agreement was not a valid prehire agreement when initially negotiated, it has functioned as a collective bargaining agreement since 1974. The statute of limitations set by

§ 10(b) of the NLRA, 29 U.S.C. § 160(b), had long since expired before Adams Construction submitted a bid for the Administration Building, and under Local Lodge No. 1424 v. NLRB, 362 U.S. 441 (1960), all of the provisions of the Project Agreement have been and are presently enforceable. Moreover, the negotiation and implementation of the Project Agreement and Georgia Power's continuing involvement in all aspects of labor relations at Plant Vogtle cause Georgia Power to be a joint employer of all craft workers at Plant Vogtle. The bargaining relationship between Georgia Power and the trade unions, the nature of the Project Agreement as an agreement governing all terms and conditions of employment for craft workers at Plant Vogtle, Georgia

Power's employment of craft workers on its own payroll under the terms of that agreement, and its status as a joint employer of all craft workers on the project all warrant the application of the labor exemption to Adams Construction's antitrust claim.

Second, even if a collective bargaining relationship did not exist between Georgia Power and the Trades Council, any agreement between them to exclude nonunion contractors from the Vogtle site would be protected by the construction industry proviso to § 8(e) of the NLRA, because it is limited to a single site. In Connell, this Court concluded that the exemption granted by the construction industry proviso to the general prohibition of secondary boycott agreements by § 8(e)

> extends only to agreements in the context of collective bargaining relationships and in light of congressional references to the Denver Building Trades problem possibly to common-situs relationships on particular job sites as well.

421 U.S. at 633. This language strongly suggests that a subcontracting agreement limited to a single site is permitted by the construction industry proviso even in the absence of a collective bargaining relationship.

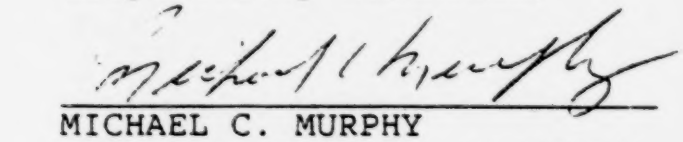
Finally, because any agreement between Georgia Power and the Trades Council would be a vertical nonprice restraint, involving relations among complementary, not competing, economic entities, none of which competes with contractors such as Adams Construction, such an agreement would have to be evaluated under the rule of reason.

Adams Construction presented no evidence to show any effect upon competition in the relevant market resulting from the exclusionary subcontracting agreement that it alleges. In its motion for summary judgment, Georgia Power affirmatively established the absence of an effect upon competitive conditions in the relevant market. The Company's summary judgment motion and argument for an affirmance in the alternative before the Eleventh Circuit thus demonstrated that it was entitled to judgment as a matter of law under the rule of reason. To grant certiorari to resolve a question of the labor exemption from the antitrust laws in a case where there is no substantial antitrust issue would invite the same risks as advisory opinions.

CONCLUSION

For the foregoing reasons, Adams Construction's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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April 4, 1985

CERTIFICATE OF SERVICE

I hereby certify that in compliance with Rule 28.3 and Rule 28.5, I have this day served three copies of the within and foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit upon each of the parties to this proceeding by causing said copies to be deposited in the United States mail with first-class postage prepaid and addressed as follows:

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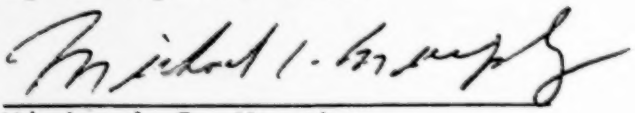
This 4th day of April, 1985.



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